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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KENNETH ARTHUR ZIEMANN, Defendant and Appellant.	D053145 (Super. Ct. No. SCD188611)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick Maguire, Judge. Affirmed in part; reversed in part and remanded with instructions.

A jury convicted Kenneth Arthur Ziemann of first degree murder (Pen. Code, § 187, subd. (a)). The trial court sentenced Ziemann to life in prison without the possibility of parole.

Ziemann appeals. He contends that his murder conviction must be reversed because the trial court erred by: (i) excluding evidence that Ziemann consented to take a polygraph test; (ii) admitting out-of-court statements by a prosecution witness;

(iii) rejecting his claim that the five-year delay between the offense and the prosecution violated his right to due process; and (iv) excluding out-of-court statements that a third party allegedly made to deceased witnesses, admitting to the crime. As discussed below, we conclude that these contentions lack merit. In addition, the Attorney General argues, and we agree, that the case must be remanded for the trial court to impose sentence on, or strike, Ziemann's three prison priors. (Pen. Code, § 1385.) Consequently, we remand for this limited purpose, but affirm the judgment in all other respects.

FACTS

In January 2000 James Sykes worked as a security guard for North Park Produce, a grocery in San Diego. Sykes suggested robbing the grocery to a friend, Glenn Irvin. Sykes told Irvin that the brothers who owned and worked at the grocery, Joseph and Abdul Nehme, typically closed the store around 7:00 o'clock each evening and took the proceeds from their sales home each night in grocery bags. Irvin agreed to rob the brothers and enlisted Ziemann to assist him.

Irvin and Ziemann obtained a revolver from a friend, Keith Mahoney, for use in the robbery. They also obtained dark clothes, gloves, beanie caps and dark nylon stockings to pull over their faces.

On Saturday, January 22, Sykes left the grocery prior to closing, telling the Nehmes that he was going fishing. Ziemann and Irvin arrived at the store shortly before closing and hid in the parking lot.

As the Nehmes exited the store, Irvin and Ziemann, wearing dark clothing and nylon stockings on their faces, confronted them. Irvin sprayed Joseph Nehme in the face

with pepper spray and punched him. Ziemann yelled at Abdul Nehme to give him the money and then shot him in the chest. Ziemann and Irvin grabbed a grocery bag and fled the scene. Abdul Nehme died of the gunshot wound, characterized by the medical examiner as a "single gunshot wound on the left side of his chest."

DISCUSSION

Ziemann raises a number of challenges to his conviction. We address each contention separately below.

I

The Trial Court Did Not Abuse Its Discretion in Excluding Evidence that Ziemann Agreed to Take a Polygraph Test

Ziemann argues that the trial court abused its discretion by excluding evidence that Ziemann told police he would take a polygraph test to demonstrate his innocence. We disagree.

Shortly after the murder, police questioned Ziemann as a possible suspect. When Ziemann denied any involvement, the police asked if he would take a polygraph examination. Ziemann agreed to do so, but the police did not pursue this offer. In responding to a pretrial motion to exclude this evidence, defense counsel argued that Ziemann's willingness to take a polygraph was relevant and admissible to show his innocent "state of mind" and that the investigators' failure to follow through with the exam demonstrated "prejudice and bias in how this investigation was done." Counsel also urged the court to wait to hear the prosecution's case before ruling on the motion; the trial court agreed to do so.

Later, during trial, Ziemann's counsel renewed his request, asking the trial court to allow Ziemann to testify that he told police, "'I will do whatever it takes to clear myself. I will take a lie detector test,' [and] they declined." Counsel specifically highlighted the testimony of a prosecution witness who explained that he had mentioned Ziemann's involvement in the robbery after the police disbelieved his initial statements. The witness stated, "The[] [police] told me they didn't believe my story; that they wanted to know if I would agree to a polygraph, and they told me I could have a couple of days to think about it." The trial court ruled that despite the prosecution witness's spontaneous reference to a request to take a polygraph test, the evidence of Ziemann's agreement to take such a test was inadmissible under Evidence Code[1] section 351.1.

Absent a stipulation by the parties, section 351.1 prohibits the introduction of polygraph evidence in a criminal case.[2] This exclusion extends beyond the results of a

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1 All further statutory references are to the Evidence Code unless otherwise indicated.

2 The provision states in full:

"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

"(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible." (§ 351.1.)

Ziemann does not contend that section 351.1 is itself unconstitutional, and our high court has upheld the section against constitutional challenges. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 845; *People v. Hinton* (2006) 37 Cal.4th 839, 890 (*Hinton*); see also *United States v. Scheffer* (1998) 523 U.S. 303, 305 [rejecting

polygraph test to also prohibit "any reference to an offer to take, failure to take, or taking of a polygraph examination." (§ 351.1.) "[A] trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion." (*People v. Williams* (1997) 16 Cal.4th 153, 197.)[3]

Ziemann argues that the proffered evidence in the instant case was not "an offer to take" a polygraph test (§ 351.1), but rather that Ziemann "agreed with the detective's request" to take a polygraph — something the statute does not explicitly cover. This argument is unconvincing. Ziemann's offer to take a polygraph test, after the investigating officer's suggestion that he do so, falls squarely within the "firm and broad exclusion" of section 351.1. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 390.) In fact, arguments as to the admissibility of virtually identical evidence regarding an *agreement* to take a polygraph examination have been rejected by our Supreme Court. (See *Hinton, supra*, 37 Cal.4th at p. 890 [rejecting challenge to trial court's exclusion of "evidence that [the defendant] agreed to the district attorney's request to submit to a polygraph examination"]; *People v. Samuels* (2005) 36 Cal.4th 96, 128 [rejecting claim that trial

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constitutional challenge to rule of evidence prohibiting introduction of lie detector evidence in court martial proceedings].)

3 Of course, to the extent the trial court's ruling depends on an interpretation of a statute (e.g., § 351.1), the proper interpretation of the statute is a question of law reviewed de novo. (*People v. Walker* (2006) 139 Cal.App.4th 782, 795 ["To the extent the trial court's ruling depends on the proper interpretation of the Evidence Code, however, it presents a question of law; and our review is de novo."].)

court erred by "refus[ing] to allow [the defendant] to present evidence of her willingness to submit to, and her successful completion of, a polygraph test," even though the prosecution had "present[ed] testimony with respect to defendant's lack of cooperation with the police during the investigation"].) Ziemann neither discusses nor attempts to distinguish these rulings of our high court and we find them controlling.

Ziemann also contends that the proffered evidence was admissible because it was intended to show that the police were unwilling to pursue any leads that might demonstrate Ziemann's innocence. Ziemann argues that this takes the proffered evidence outside of the scope of section 351.1, because the purpose of the section (according to Ziemann) is that it "prevents the jury from speculating as to the results" of any referenced polygraph examination. Ziemann does not support his contention with any authority and we are unaware of any case that has parsed the unequivocal language of section 351.1 in this manner. (Ziemann's interpretation is clearly inconsistent with the statutory text prohibiting references even to a "failure to take" a polygraph test.) (§ 351.1.)

Section 351.1 does not limit its broad preclusion to certain uses of polygraph evidence; rather, it precludes *any* evidence regarding polygraph tests. (§ 351.1; contrast § 1101 [excluding evidence of prior bad acts, but excepting from this prohibition such evidence if utilized for certain purposes].) Grafting an exception onto this unqualified prohibition of polygraph evidence, as Ziemann urges us to do, would be flatly inconsistent with our role in interpreting unambiguous statutory text. (See *People v. Atlas* (1998) 64 Cal.App.4th 523, 527 ["'It is not our function . . . to add language or imply exceptions to statutes passed by the Legislature.'"], quoting *Roberts v. City of*

Palmdale (1993) 5 Cal.4th 363, 372; *People v. Wagner* (2009) 45 Cal.4th 1039, 1056 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous."].)

In sum, as section 351.1's clear and unambiguous prohibition covers the evidence sought to be admitted in this case, we cannot conclude that the trial court abused its discretion in excluding the evidence.

II

The Trial Court Did Not Abuse Its Discretion in Admitting Irvin's Out-of-court Statements

Ziemann contends that the trial court erred by allowing the prosecution to introduce various out-of-court statements made by a prosecution witness (Irvin) after the witness's credibility was impeached. We evaluate this contention after providing the relevant procedural history and legal principles.

A. *Procedural History*

Glenn Irvin was the prosecution's key witness. Irvin testified that he and Ziemann committed the North Park Produce robbery and communicated the specifics of the robbery to the jury, including that Ziemann was the one who shot Abdul Nehme. On cross-examination, defense counsel challenged Irvin's credibility on numerous grounds. Among those grounds, defense counsel highlighted that Irvin made a number of prior statements that were inconsistent with his trial testimony, and that Irvin was testifying to obtain the benefit of a favorable plea bargain.

After cross-examination, the prosecutor sought to introduce evidence that Irvin made a number of statements predating the plea bargain that were consistent with his trial testimony. The trial court granted the prosecutor's request. The prosecution then introduced the following evidence. (1) Irvin's former girlfriend, Shannon Carman, testified that just after the robbery, Irvin told her that he had robbed North Park Produce, and "things went bad" and Ziemann shot one of the owners. (2) Estor Simon, Irvin's mother, testified that in early 2005, Irvin told her that he and Ziemann had been "involved with a very bad robbery that had gone very, very bad" and that someone had been killed. (3) Rachel Espanol, who had been dating Irvin, testified that in 2003 Irvin told her that he and Ziemann robbed North Park Produce and that during the robbery Ziemann shot a man. (4) Jared Matthews, an acquaintance of both Irvin and Ziemann, testified that in late 2002 Irvin told him that he and Ziemann committed a robbery and Ziemann killed the victim of the robbery.[4]

B. *Legal Principles*

Evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated is hearsay and is generally inadmissible. (§ 1200.) Section 791 provides that, except in two specified circumstances, out-of-court statements by a testifying witness that are consistent with the witness's testimony fall within this hearsay prohibition. Under the first exception, prior consistent statements may be admitted if they predate an inconsistent statement used to

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4 The trial court recognized a continuing defense objection to the statements. Irvin's statements to these witnesses identified Ziemann by his nickname, "K.Z."

impeach the witness's testimony. Second, prior consistent statements may be admitted after the witness's testimony has been challenged as "recently fabricated or [a]s influenced by bias or other improper motive," so long as the prior consistent statement was made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (§ 791, subd. (b);[5] *People v. Kennedy* (2005) 36 Cal.4th 595, 614 ["A prior consistent statement is admissible as an exception to the hearsay rule if it is offered after admission into evidence of an inconsistent statement used to attack the witness's credibility and the consistent statement was made before the inconsistent statement, or when there is an express or implied charge that the witness's testimony was recently fabricated or influenced by bias or improper motive, and the statement was made before the fabrication, bias, or improper motive."].) In addition, section 1236 reiterates that "[e]vidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (§ 1236.) A challenge to a trial court's rulings under sections 791 and 1236 is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22

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[5] Section 791 reads in full:

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Cal.4th 690, 725 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question"]; *People v. Welch* (1972) 8 Cal.3d 106, 117 [reviewing trial court ruling under section 791 for abuse of discretion].)

C. *Analysis*

Ziemann contends that the trial court abused its discretion by allowing the prosecution to introduce Irvin's prior statements. We disagree.

As the prosecutor emphasized in the lower court proceedings, Ziemann's counsel explicitly argued that Irvin's testimony was colored by the plea agreement he entered into with the prosecution in May 2006. During a significant portion of Irvin's cross-examination,[6] Ziemann's counsel brought out that Irvin pleaded guilty to voluntary manslaughter for the Nehme murder and, in exchange, the prosecution dismissed a first degree murder charge. In his questioning, defense counsel emphasized the significant benefits Irvin received by virtue of the plea, noting that given Irvin's prior record, the murder charge "exposed you to way in excess of 25 years to life." Counsel's examination noted that the plea included a stipulated term of 27 years "guaranteed time . . . as opposed to . . . an indeterminate sentence," and would run concurrent to a 13-year sentence Irvin was serving for an unrelated burglary. (In essence, by virtue of the plea agreement, Irvin

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6 Counsel's initial cross-examination regarding the plea bargain runs for six pages of the trial transcript. Counsel also questioned Irvin regarding the plea agreement on recross-examination.

reduced his exposure for the Nehme homicide from life imprisonment to a determinate sentence of 14 years.)

Ziemann's counsel stated that Irvin's "most important obligation under th[e] [plea] agreement" was that he "tell the truth" (i.e., point the finger at Ziemann) as evidenced by a document accompanying the plea, entitled "Cooperation Agreement." According to counsel, the Cooperation Agreement "says we are giving you this deal on the agreement that you tell the truth." Later, on recross-examination, Ziemann's counsel reemphasized that Irvin was "telling the truth [i.e., testifying against Ziemann] so you don't have to do [i]n excess of 25 years to life" and "[t]hat's the only reason you are testifying." Irvin agreed.

Analyzed under subdivision (b) of section 791, defense counsel's examination of Irvin is fairly characterized as charging that Irvin's testimony against Ziemann was fabricated, at least in part, to obtain the benefits of the May 2006 plea agreement. (§ 791, subd. (b) [prior consistent statement admissible after "express or implied charge" that witnesses testimony "is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen"].) Consequently, statements made by Irvin prior to his entry into the plea agreement that were consistent with his trial testimony were admissible under section 791, subdivision (b).[7]

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[7] As we conclude that the trial court did not abuse its discretion in permitting the introduction of the statements under section 791, subdivision (b), we need not determine whether the statements were also admissible under section 791, subdivision (a).

While Ziemann acknowledges that his counsel raised the 2006 plea agreement to impugn Irvin's testimony, he argues that the prior consistent statements subsequently introduced did not predate a more general improper motive raised by his counsel in cross-examination — Ziemann's ongoing incentive to curry favor with the government. Ziemann argues that from Irvin's initial interview with police in 2000 and, more definitively, after his (unsuccessful) effort to obtain favorable treatment from the government when arrested for an unrelated offense in 2002,[8] Irvin possessed essentially the same motive to curry favor with the government that existed after he pleaded guilty in 2006. Ziemann argues, therefore, that any statements arising after the 2000 or 2002 time frame were infected with the same bias that existed after the plea in 2006 and consequently could not be admitted to rehabilitate him under section 791, subdivision (b).

Arguments virtually identical to that presented here have been rejected by our Supreme Court in *People v. Hillhouse* (2002) 27 Cal.4th 469 (*Hillhouse*), *People v. Andrews* (1989) 49 Cal.3d 200 (*Andrews*), and *People v. Jones* (2003) 30 Cal.4th 1084 (*Jones*).

In *Hillhouse*, the defense had "cross-examined [a prosecution witness] extensively regarding the [witness's] plea agreement and at least implied that [the witness] was

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8 Police interviewed Irvin shortly after the murder and Irvin denied involvement. In December 2002 Irvin was arrested for an unrelated crime and, in an effort to obtain favorable treatment for that offense, told police that he had information regarding the North Park Produce murder. In a follow-up interview the next day, Irvin told the police that, walking home from dinner, he witnessed Ziemann and a person he thought was Keith Mahoney rob the grocery. Irvin did not receive any deal from the authorities based on these statements.

testifying as he did because of that agreement." (*Hillhouse, supra,* 27 Cal.4th at p. 491.) The defendant argued, however, that the witness's prior consistent statements should not be admitted because "'[n]o new motive for fabrication is engendered by the plea bargain'" as the witness "had a motive to minimize his role in the crime even before he made the prior consistent statements." (*Ibid*.) Our high court rejected this contention, explaining:

> "This is no doubt true, but defendant also implied at trial that the plea agreement provided an *additional* improper motive. A prior consistent statement logically bolsters a witness's credibility whenever it predates *any* motive to lie, not just when it predates all possible motives. Accordingly, under Evidence Code section 791, 'a prior consistent statement is admissible as long as the statement is made before the existence *of any one of the motives* that the opposing party expressly or impliedly suggests may have influenced the witness's testimony.' (*People v. Noguera* (1992) 4 Cal.4th 599, 629, italics added.)" (*Hillhouse, supra*, 27 Cal.4th at pp. 491-492.)

Similarly, in *Andrews, supra,* 49 Cal.3d 200, our high court rejected the contention that a witness's prior consistent statement should have been excluded because the witness had a "general motive to fabricate" in order "to obtain leniency at defendant's expense" at the time of the prior statement. (*Id*. at p. 210.) The court explained that "defense counsel's questioning of [the witness] raised an implicit charge that the [plea] 'deal' provided [the witness] with an *additional* motive to testify untruthfully. This, in turn, entitled the prosecution to show that [the witness's] testimony was consistent with the recorded statement he gave shortly after his arrest but before the 'deal' was consummated, that is, before the subsequent, specific motive to fabricate arose." (*Ibid.*, italics added.)

Again in *Jones,* the defense impeached a prosecution witness with a "favorable plea bargain." (*Jones, supra,* 30 Cal.4th at p. 1106.) The prosecutor attempted to

rehabilitate the witness by presenting evidence of a consistent statement he gave to police before he had been charged with a crime. (*Ibid.*) On appeal, the defendant argued the trial court erred because at the time of the earlier statement, the prosecution witness "feared prosecution for the murder . . . , and thus had a motive to put the blame on [the defendant] as soon as the police contacted him about that murder." (*Ibid.*) Our high court rejected this contention, holding that that "the trial court . . . properly admitted the consistent statement of [the prosecution witness] because it was made before the plea bargain was struck and thus before the existence of one of the grounds alleged in defendant's charge that [the witness's] trial testimony was biased." (*Id.* at p. 1107.)

As in *Hillhouse*, *Jones* and *Adams*, even if Irvin possessed a similar motive to implicate Ziemann in 2000 and 2002, the 2006 plea bargain provided "an *additional* improper motive" to identify Ziemann as the gunman in the murder. (*Hillhouse*, *supra*, 27 Cal.4th at p. 491.) Cross-examination regarding this additional motive thus triggered the admissibility of the prior consistent statements predating the 2006 plea under section 791, subdivision (b). Ziemann fails to present any argument why the decisions in *Hillhouse*, *Jones* and *Adams* are distinguishable and, in our view, these cases are controlling.

Ziemann also argues that the statements did not fall within the exception provided by section 791 because Irvin's prior statements regarding the robbery were "only partially consistent" with his trial testimony, were "inconsistent with subsequent statements" and were "at every stage couched in deception so as to be self-serving." Ziemann adds that, "in this same regard," the statements should have been deemed inadmissible, even if they

are covered by the exceptions in section 791, because "they lacked the reliability otherwise required for admissibility for hearsay evidence." Ziemann cites no authority for these contentions and we believe they lack merit.

The prior statements exhibited sufficient consistency with Irvin's trial testimony to qualify as prior "consistent" statements under sections 791 and 1236. The central contention of Irvin's trial testimony was that he and Ziemann robbed North Park Produce and that, during the robbery, Ziemann shot Abdul Nehme. In cross-examination, Ziemann's counsel tried to show that this specific contention was not credible (in part, because Irvin was only cooperating in Ziemann's prosecution to obtain the benefit of a plea agreement). Irvin's statements, before entering the plea, that he and Ziemann robbed North Park Produce and Ziemann shot the victim when the robbery went bad, were "consistent" with his trial testimony.

Ziemann's contention that Irvin's statements should have been excluded because they were inconsistent with other statements Irvin made or were otherwise unreliable is also unavailing. As we have explained, sections 791 and 1236 provide an explicit mechanism for the admission of prior consistent statements. As the statements offered here by the prosecution satisfied the dictates of those sections, they were admissible over the defendant's hearsay objection. (§ 1236 ["Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."].) The fact that Irvin's statements over time were inconsistent, or that he was, in Ziemann's view, generally unreliable does not alter this analysis. Section 791 contemplates that the jury

will be presented with both the consistent and inconsistent statements of a testifying witness, and that the witness's testimony will be challenged as arising from an improper motive. The statutory framework does not suggest that when this occurs, the trial court should parse through the various admissible statements and exclude those it deems unreliable. Rather, the Evidence Code requires the trial court to admit all of the statements (so long as the statements meet the applicable statutory requirements), along with any charge of bias, and leave the ultimate resolution of the witness's credibility to the jury. In short, any argument that the totality of admissible statements demonstrated that Irvin lacked credibility did not go to the admissibility of the prior consistent statements, but to their weight.

Finally, Ziemann contends that the admission of the statements, even if proper under sections 791 and 1236, violated his Sixth Amendment right to "be confront[ed] with the witnesses against him." (U.S. Const., 6th Amend.) This contention is without merit. "[W]hen the declarant appears for cross-examination at trial, the [Sixth Amendment's] Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) Here, Irvin testified at trial and was available to "defend or explain" his prior statements. (*Ibid.*) Consequently, there can be no claim that the admission of his prior statements violated the Sixth Amendment. (*Ibid.* ["The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."].)

III

The Trial Court's Finding that Ziemann Failed to Demonstrate Any Prejudice From Preindictment Delay Is Adequately Supported by the Record

Ziemann next asserts that the "unjustified and negligent delay between the time of the offense and the filing of the complaint against him" prejudiced his ability to defend himself and thus violated his due process rights. We evaluate this claim after setting forth the pertinent procedural history.

A. *Procedural History*

After the jury verdict, Ziemann brought a motion for a new trial alleging, among other things, the denial of Ziemann's "right to a speedy trial." The motion noted that while the offense occurred on January 22, 2000, the complaint charging Ziemann was not filed until February 10, 2005. In an attempt to demonstrate the requisite prejudice from the delay, the motion states:

> "[T]he defendant asserts that his alibi defense was substantially impaired by the prosecution's failure to bring the case to trial in a more timely fashion. Specifically, alibi witnesses[']recollection were imprecise because of the passage of time and some alibi witnesses could not recall the incident which happened so many years previously. The defendant asserts that his family members, and perhaps others, would have provided more precise and detailed alibi testimony had the trial been brought in a timely manner."

The trial court held a hearing on the motion at which it rejected the speedy trial challenge on the sole ground that Ziemann failed to demonstrate "actual prejudice" from the five-year delay.[9]

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9 Although Ziemann styled his motion as a "new trial" motion, the relief sought on this ground was presumably not a new trial (which would simply compound the problem

B. *Analysis*

As Ziemann recognizes on appeal, because the challenged delay occurred prior to Ziemann's being formally charged or arrested, his claim "must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." (*United States v. MacDonald* (1982) 456 U.S. 1, 7; *People v. Butler* (1995) 36 Cal.App.4th 455, 466.) Speedy trial issues arise when a defendant is formally charged, but not brought to trial in a timely manner. In a circumstance where a delay accrues prior to the filing of a complaint, "the speedy trial doctrine does not apply. The right to due process is involved during that period." (*Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 910.) Nevertheless, "the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against the justification for that delay." (*Ibid.*; see also *People v. Catlin* (2001) 26 Cal.4th 81, 107.)

In order to establish a due process violation from prearrest delay, the defendant must make an initial showing of prejudice. (*Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) This is particularly true where the defendant seeks dismissal of a prosecution for an offense, such as murder, for which there is no statute of limitations. "To avoid murder charges due to delay, the defendant must affirmatively show prejudice." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250 ["'[T]he statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,' and there 'is no

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of delay), but outright dismissal of the prosecution. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 912 (*Dunn-Gonzalez*); cf. *People v. Archerd* (1970) 3 Cal.3d 615, 641 ["It is proper for the trial court to wait to appraise the reasonableness of the delay in light of what would be disclosed at and after the trial, which places him in an excellent position to rule on a renewed motion."].)

statute of limitations on murder.'"].) "If defendant fails to show prejudice, the court need not inquire into the justification for the delay since there is nothing to 'weigh' such justification against. This is particularly true when there is no evidence the delay was for the purpose of weakening the defense." (*Dunn-Gonzalez,* at p. 911.)

Both justification for a delay and resulting prejudice are factual questions and, consequently, the trial court's findings on those questions will be upheld on appeal so long as they are supported by substantial evidence. (*People v. Mitchell* (1972) 8 Cal.3d 164, 167 [question of whether delay required dismissal of charges was "a factual one and there being substantial evidence to support the finding of the trier of fact, the ruling of the trial court must be upheld"]; *People v. Hill* (1984) 37 Cal.3d 491, 499; *Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 912.) Consequently, as our Supreme Court has observed, whether a delay in bringing charges to trial warrants dismissal must generally be "won or lost at the trial level." (*Hill*, at p. 499.)

In the instant case, the trial court rejected the "speedy trial" challenge on the ground that the defendant failed to affirmatively demonstrate actual prejudice. On appeal Ziemann contends, as he did in the trial court, that he made the requisite showing of prejudice by pointing to the possibility that alibi witnesses might have testified more persuasively had the trial occurred closer to the time of the offense.

We conclude that the trial court's ruling is adequately supported by the record and thus cannot be disturbed on appeal. As our Supreme Court has stated in similar circumstances, "[t]he showing of actual prejudice which the law requires must be supported by particular facts and not . . . by bare conclusionary statements." (*Serna v.*

Superior Court (1985) 40 Cal.3d 239, 250 [concluding that trial court did not err in denying challenge to nearly five-year delay in bringing charges where allegation of prejudice consisted of conclusory assertions that the defendant's memory of the event had faded and he no longer recalled the names and whereabouts of witnesses who might corroborate his innocence].) In the instant case, Ziemann's new trial motion simply asserted generically that a prompter prosecution might have benefited his defense, but failed to support this assertion with any "'particular facts.'" (*Ibid.*; *People v. Hartman* (1985) 170 Cal.App.3d 572, 579 ["A defendant must show *actual* prejudice based on the facts of the case."].)

Ziemann claims that his circumstances are "similar" to those present in *Jones v. Superior Court* (1970) 3 Cal.3d 734, where our Supreme Court dismissed a prosecution based on lengthy pretrial delay. (*Id.* at pp. 740-741.) That case is easily distinguishable. There, our high court determined, in reviewing a pretrial request to dismiss a heroin sale prosecution, that actual prejudice existed because during the lengthy precharging delay, the defendant had no way to prepare for a defense to a future prosecution because he "did not know when or how [the police] believed the crime was committed." (*Id.* at p. 741.) Here, by contrast, Ziemann was aware approximately one week after the offense that the police suspected him of involvement in a specific murder that occurred at a specific time and place. Consequently, unlike the defendant in *Jones v. Superior Court*, *supra*, 3 Cal.3d 734, the delay in bringing Ziemann to trial did not impede his "ability to reconstruct his activities at some unknown date before he knew he was suspected of some offense." (*Id.* at p. 741.)

In his own testimony, Ziemann explained that because he and his wife were questioned about the January 22, 2000 homicide on February 3 of that year, he had been able to "focus on that date" and recall his activities. Thus, at trial, both Ziemann and his wife testified to their precise whereabouts and activities on the day of the offense. As Ziemann's wife testified, she specifically recalled that Ziemann was with her the night of the murder "[b]ecause the detectives came. Two detectives came to our house approximately ten days later and asked us where we were on that night. We had to recall and remember exactly the events of that day."[10]

In sum, there is nothing in the trial record to support Ziemann's conclusory assertion that the delay interfered with his or his wife's ability to recall their whereabouts at the time of the offense. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506 (*Scherling*) [noting, in rejecting similar claim, that the trial court "determined that [the defendant's] testimony did not demonstrate any loss of memory, and that he was very specific regarding details which supported his contentions"].) With respect to other witnesses, Ziemann fails, even in his appellate brief, to specifically identify any other

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10 Ziemann attempts to further buttress his claim on appeal, asserting that the delay also caused the loss of two witnesses "who reportedly heard a third party [Charles Felder] admit to having committed the crime," but died shortly before trial. Ziemann failed to raise this contention in support of the motion in the trial court and thus we cannot properly consider it as a ground for reversing the trial court's ruling.

Since this claim was not raised below, the record is not developed on this point, but we also note that so far as the record suggests that the witnesses died well after Ziemann was charged, their unavailability at trial could not solely be attributed to the prosecution's delay. Ziemann's trial occurred two years after he was charged and Ziemann's new trial motion acknowledges that during this time period, "the defendant made no demand for a speedy trial and in fact continually waived time for trial."

witness who would have corroborated his alibi, but for the passage of time. Consequently, Ziemann's contention that the five-year delay deprived him of certain alibi testimony is sheer speculation and we, thus, cannot disturb the trial court's finding that Ziemann failed to demonstrate actual prejudice.[11] (See *Scherling*, *supra*, 22 Cal.3d at pp. 505-506 [affirming trial court's conclusion that no prejudice resulted from pretrial delay despite defendant's claim that because of the delay "his memory of the crimes has faded and . . . a number of witnesses who were available to verify his defense have died or are unavailable"]; *People v. Roybal* (1998) 19 Cal.4th 481, 513 [rejecting contention that pretrial delay warranted reversal where prejudice alleged was "largely speculative"].)

IV

The Trial Court's Exclusion of Certain Defense Evidence as Hearsay Does Not Warrant Reversal

Ziemann contends that the trial court erred in excluding certain evidence offered by the defense to demonstrate that the police investigation was biased and incompetent. Ziemann also contends the exclusion of this evidence violated his constitutional right to present evidence in his defense. We evaluate these contentions after summarizing the defense evidence Ziemann claims was erroneously excluded.

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11 As we conclude that the trial court's finding regarding prejudice is adequately supported by the record, we need not evaluate the justification, if any, for the delay. (*Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.)

A. *Pertinent Defense Evidence*

Three separate evidentiary exclusions, discussed below, are challenged by Ziemann.

First, the trial court excluded a statement made to police by an 80-year old woman, Pauline Adams (who died prior to trial), that she heard Charles Felder admit to committing the offense. After hearing defense counsel's proffer regarding this evidence, the trial court excluded it as "rank hearsay." The court emphasized, however, that the proposed line of inquiry — police incompetence and bias in the investigation — was otherwise proper and defense counsel could ask the police officers involved in the case about leads they received and the degree to which they pursued those leads.

Second, the defense sought to admit the testimony of an investigator who would testify that he interviewed Pamela Kelly, who also stated that she heard Charles Felder admit his involvement in the robbery and murder. Felder further relayed to Kelly details about the robbery, such as why Felder shot the victim. Kelly, like Adams, had since died. The trial court excluded the statement as hearsay. Again, however, the trial court emphasized that defense counsel could ask police officers about any leads they received and their follow-up investigation with respect to those leads.

Third, and finally, Ziemann argues that the trial court erred in its "refusal to allow appellant to elicit evidence that the police initially sent out a department-wide communiqu[é] specifying that the suspects in the North Park robbery were [B]lack males." Ziemann argues that the trial court erroneously excluded this evidence as

hearsay, and the error was prejudicial because the evidence "was relevant to underscore [Ziemann's] claim of police bias."

B. *The Exclusion of the Evidence as Hearsay, Even If Erroneous, Was Not Sufficiently Prejudicial to Warrant Reversal*

Ziemann argues that the trial court abused its discretion by excluding the evidence summarized above as hearsay. Ziemann emphasizes that statements only constitute hearsay if offered for the truth of the matter asserted. (§ 1200.) In the instant case, Ziemann argues, he sought to admit the statements solely for a nonhearsay purpose (to demonstrate the inadequacy of the police investigation), and not for their truth (i.e., to show that Black males, or Charles Felder who, unlike Ziemann and Irvin, is Black, committed the murder).

We begin by noting that one of the pieces of evidence that Ziemann complains was excluded was, in fact, admitted. Called as a witness for the defense, Officer Jimme Valle testified that shortly after the murder, he sent out a police bulletin containing the following information regarding the robbery: "two suspects, both described as Black males, approximately 22 to 25 years of age, anywhere from 5'3" to 5'9." Thus, the contention that the trial court erroneously refused to admit evidence of police bulletins describing the suspects as Black males is without merit.

We turn next to the statements made to investigators by the two now-deceased women, Adams and Kelly, that Charles Felder said he committed the murder. The trial court correctly noted that these statements, if utilized for their obvious purpose (to identify the perpetrator of the robbery), constituted hearsay. Of course, if, as Ziemann

contends, the statements were offered solely to demonstrate an incomplete investigation by police, they were not hearsay as they would not be introduced for the truth of the matter asserted (Felder's guilt), but to show that the police were not diligent in pursuing certain leads. (§ 1200.)

The above distinction between the purposes for which the evidence was admissible (or inadmissible) assists Ziemann's effort to demonstrate error: that the proffered evidence was not properly excluded as hearsay. At the same time, however, the distinction severely undermines Ziemann's ability to show a second requisite element for reversal on appeal — prejudice.

An appellate court may not set aside a jury's verdict on the ground of the erroneous exclusion of evidence unless the record shows that, absent the error, there is a reasonable probability that the verdict would have been different. (See Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."]; § 354 ["A verdict . . . shall not be set aside . . . by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error . . . is of the opinion that the error . . . complained of resulted in a miscarriage of justice . . . ."].) To the extent, as Ziemann urges, the trial court erred in excluding the statements for the specified nonhearsay purpose, we have little trouble concluding that this error was not sufficiently prejudicial to warrant reversal.

The quality of the police investigation was a tangential matter in the trial. The trial centered on the jury's credibility determinations — i.e., whether to credit the testimony of Irvin that he and Ziemann committed the offense, or Ziemann's testimony that he had nothing to do with the crime. Indeed, the trial court, in reviewing posttrial motions, stated that the case "just came down to a credibility call" and opined that Ziemann "lost the jury" when he admitted he told Tammy Scott (as she testified) that he committed the robbery. (Ziemann claimed he misled Scott to appear to be a tough guy.)

Further, the trial court expressly permitted defense counsel to call and ask investigating officers about the leads they received and the degree to which they followed through on those leads. This inquiry provided the defense with sufficient leeway to elicit and argue, through questioning or the presentation of (admissible) evidence, facts tending to show that the police failed to conduct a proper investigation into the North Park Produce robbery, and to argue the possibility that two Black males committed the offense. For example, defense counsel established that the detective who interviewed Ziemann and his wife failed to follow up with a family member mentioned during the interview. Further, the defense presented evidence that the police were given information early in the investigation, by two separate persons, that the crime was perpetrated by two Black suspects.[12] From this evidence, the defense could argue that the police should

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12 Valle testified that a witness said she thought the perpetrators' "voices sounded like they were Black," and that he sent out a communiqué suggesting that the perpetrators were two Black men based on an additional interview with another witness who said she observed two Black persons walking away from the scene immediately after the robbery.

have, but failed to, investigate the possibility that someone other than Irvin and Ziemann committed the crime.[13]

Evidence that two, now-deceased witnesses had provided specific information that Felder said he was the perpetrator — *admitted solely for purposes of the jury's further evaluation of the thoroughness of the police investigation* — would have done little to alter the analysis. Consequently, even if the trial court erred in precluding the defense from introducing the excluded evidence for the limited purpose of fully illuminating the leads given to police, there is not a reasonably probability that the verdict would have been different. (*People v. Watson* (1956) 46 Cal. 2d 818, 836; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [holding that error in the exclusion of defense evidence "on a minor or subsidiary point" as opposed to "the complete exclusion of evidence intended to establish an accused's defense" is subject to review under *Watson* standard]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [holding that where "'[t]he trial court's ruling was an

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13 In closing argument, defense counsel repeatedly criticized the police investigation, stating that after the Ziemanns provided alibi information to the police, the police "didn't bother to follow up on it"; "they didn't take the time to talk to [his] mother-in-law[;] they didn't take the time to see whether or not [his] alibi was true . . . because, you know what, . . . they didn't want to hear it. They just wanted [him] to admit [his] guilt. Let them wrap up their case, and away they go." "If your loved one was sitting as a defendant and you were a juror, would you not want the police to check his alibi out? Would you not want that amount of effort on behalf of the police?" "Maybe if the detectives back then took a half an hour or two hours to go and interview the alibi witnesses, maybe we wouldn't be here today." "Is it too much to go out and investigate Kenneth and Kacey Ziemann's story? Is it too much to do in order to try to bring him to justice for th[e] crime?" Counsel also referenced the two witness statements given to police after the robbery indicating that the perpetrators were Black, as well as another witness statement, suggesting that the perpetrators were Mexican.

error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense,'" and consequently "the proper standard of review is that announced in *People v. Watson*"].)

C. *The Exclusion of the Evidence Did Not Violate Ziemann's Constitutional Right to Present Evidence*

Ziemann also contends that the trial court's ruling amounted to constitutional error because it violated his right to present evidence on his behalf. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 (*Chambers*) ["Few rights are more fundamental than that of an accused to present witnesses in his own defense."].) Ziemann relies on two cases for this contention. Both are distinguishable. The first case, *Washington v. Texas* (1967) 388 U.S. 14, is inapplicable as it concerned a state law prohibiting certain witnesses who were "physically and mentally capable of testifying to events that [they] had personally observed" from testifying at the defendant's trial. (*Id.* at p. 23 ["We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."].) Thus, Ziemann did not seek to present the testimony of any percipient witness (i.e., Felder). (In fact, Felder was available to testify at trial, but apparently would simply have proclaimed his innocence as he had done in a tape recorded interview with police.) Rather, Ziemann sought to present the testimony of

investigators who spoke to the now-deceased persons, who, in turn, heard a statement from Felder who (purportedly) personally observed the relevant events.

The second case, *Chambers*, *supra*, 410 U.S. 284, is also distinguishable. In *Chambers*, a state court excluded testimony that a person other than the defendant confessed to the charged murder on three separate occasions, on the grounds that Mississippi did not recognize a hearsay exception for statements against penal interest. (*Id.* at pp. 298-299.) The United States Supreme Court found that the defendant's federal constitutional rights to a fair trial were violated because "[t]he testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest [and] was critical to Chambers' defense." (*Id.* at p. 302.)[14]

In the instant case, the trial court did not exclude Felder's alleged statements because California does not recognize a hearsay exception for statements against penal interest. In fact, California has the very exception that Mississippi lacked. (See *Chambers*, *supra*, 410 U.S. at p. 299 [noting that "[a]mong the most prevalent of the[] [hearsay] exceptions is the one applicable to declarations against interest"]; § 1230

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14 In drawing an analogy to *Chambers*, Ziemann implicitly shifts from the contention that Felder's alleged statements were not admissible for the matter asserted to an assertion that it was intended and admissible to show that Felder, "and not [Ziemann], was guilty of the North Park robbery." (To the extent Ziemann maintains that the evidence was relevant only to highlight the inadequacy of the police investigation, then *Chambers* would be easily distinguished on that ground as well.) (*Chambers*, *supra*, 410 U.S. at p. 302 [emphasizing that the excluded "testimony . . . was critical to Chambers' defense"].)

[exception to hearsay rule for declarations against penal interest].) The trial court excluded the statements because the persons who allegedly heard them, Adams and Kelly, were deceased. Consequently, the proffered evidence consisted of two distinct levels of hearsay: (1) Felder's purported statement to Adams/Kelly (arguably admissible as declarations against interest); and (2) Adams's/Kelly's statements to investigators (not covered by any recognized hearsay objection). This second level of hearsay — the investigators' proposed testimony that "*Adams and Kelly said* that Felder said . . ." — rendered the statements pure hearsay not subject to any traditional hearsay exception. (§ 1200; *Chambers*, at p. 302 [recognizing that "perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay" along with the rule's traditional "exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy"].) Further, the repeated relation of the statements from one person to another degraded the reliability of the statements, and prevented the prosecution from being able to cross-examine the persons who heard the statements — further distinguishing the statements at issue here from those in *Chambers*. (See *Chambers*, at p. 301 [emphasizing that "if there was any question about the truthfulness of the extrajudicial statements, [the declarant] was present in the courtroom and was under oath" and so "could have been cross-examined by the State, and his demeanor and responses weighed by the jury"].) Consequently, we find *Chambers* to be distinguishable and believe instead that the general rule announced in that case applies here: "the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and

innocence." (*Chambers*, at p. 302; *People v. Lucas* (1995) 12 Cal.4th 415, 464 [rejecting claim that "the application of the general rule excluding hearsay evidence constituted a denial of due process"]; *People v. Marks* (2003) 31 Cal.4th 197, 227 ["the application of ordinary rules of evidence . . . does not implicate the federal Constitution"].)[15]

V

The Case Must Be Remanded for the Striking of, or Imposition of Sentence on, Ziemann's Prison Priors

The Attorney General asks us to remand the case to the trial court for resentencing so that the court can "either strike or impose" a one-year sentence enhancement for Ziemann's three prison priors. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["Once the prior prison term is found true within the meaning of [Pen. Code §]667.5[, subd.](b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken."].)

While we are sympathetic to Ziemann's contention that the trial court probably intended to strike the prison priors, a sentencing court is required to state its reasons in exercising its discretion to strike or impose an otherwise mandatory term for a prison

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15 Ziemann also cites *People v. Hall* (1986) 41 Cal.3d 826, which he contends stands for the proposition that evidence that a third party committed a crime can only be excluded under section 352. (See § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."].) *Hall*, however, does not suggest that the hearsay rules do not apply when the defense presents evidence of a third-party perpetrator. Rather, that case explains that "courts should simply treat third party culpability evidence like any other evidence." (*Id.* at p. 834.) That is exactly what the trial court did here.

prior. (Pen. Code, § 1385, subd. (a); *People v. Jordan* (2003) 108 Cal.App.4th 349, 368.) Because we cannot assume the reasons for striking prior prison enhancements, we are obligated to remand the case to the lower court with directions to exercise its discretion to either strike or impose the prior prison term enhancements.

DISPOSITION

The judgment is reversed in part and remanded for the trial court to impose sentence on or strike Ziemann's three prison priors. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.